IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
APPEAL NO.1410 OF 2003

Azaruddin Tafajjal Hussain Shah]
residing at Hanif Chawl,]
Room No.28, Hill Kureshi Nagar,]
Kurla (E), Mumbai-400070]
(At present detained at Central]
Prison, Kolhapur at Kalamba]..Appellant
[Ori.Accused]

Vs.

State of Maharashtra]
(at the instance of Sakinaka]
Police Station)]..Respondent
[Ori.Complainant]

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Mr.A.P.Mundargi with Mr.M.K.Kocharekar Advocate for Appellant
Mrs.A.S.Pai APP for State

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CORAM: R.M.S.KHANDEPARKAR, AND
SMT.V.K.TAHILRAMANI, JJ.

DATE OF RESERVING
JUDGMENT: OCTOBER 09, 2007

DATE OF PRONOUNCING
JUDGMENT: OCTOBER 19, 2007

JUDGMENT [PER SMT.V.K.TAHILRAMANI, J.]:

1. Through this appeal, the appellant-Azaruddin Tafajjal Hussain Shah - original accused has challenged the judgment and order dated 5th November, 2003 passed by the learned Additional Sessions Judge, Mumbai in Sessions Case No.1360 of 1994. By the said judgment and order, the learned

Sessions Judge convicted the appellant under Section 302 and 449 of IPC. For the offence under Section 302 of IPC, he was sentenced to R.I. for life, however, no separate sentence was passed under Section 449 of IPC.

2. The prosecution case briefly stated is as under:

. The complainant P.W.1 Smt.Khwajabi Shaikh Mohmad was the first wife of the deceased Shaikh Mohd. Miya. On 30.7.1994 at about 6.30 p.m. the complainant heard shouts of her husband. On rushing to the spot, she saw the accused assaulting her husband Shaikh Mohd. Miya Thereafter, the accused ran away. She went to the police station and lodged her complaint. The injured was taken to the hospital. Shortly thereafter, he died. P.W. 10 Dr.Manohar P.Shivsharan conducted post mortem on the dead body. He found the following injuries on the dead body.

1. Incised injury on left chest 2 cm. upper and lateral aspect of nipple 3.5 cm. Long sutured.

2. Incised injury on left thigh upper third portion 3.5 cm. long sutured.
3. CLW left side of midline on T-6 AND T-7 2 x 1 cm. skin deep.
4. Surgical incision with sutures 14 cm. long in midline with three rubber cathetors one on each side of iliac fossa and third at lower end of incision near umbilicus all were covered by dressing.

After completion of investigation, the charge sheet came to be filed.

3. Charge came to be framed against the appellant-accused under Sections 449 and 302 of IPC. The appellant pleaded not guilty and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellant as stated in paragraph 1 above. Hence, this appeal.

4. We have heard Mr.A.P.Mundergi, the learned

Senior Counsel for the appellant and Mrs.A.S.Pai APP for the State. We have also perused the judgment and order passed by the learned Sessions Judge as well as records pertaining to the present case. After giving our anxious consideration to the matter, we are of the opinion that this appeal deserves to be allowed.

5. So far as the involvement of the appellant in the incident is concerned, the prosecution has tried to establish the same by examining three eye witnesses i.e. P.W.1 Smt.Khwajabi Sk.Mohmad, P.W.3 Smt.Afzalbi Shaikh Mohd. and P.W.8 Mrs.Mehboobi Pasha Shaikh. P.W.1 Khwajabi is the complainant in the present case. It is the prosecution case that she is an eye witness to the said incident. She is the first wife of the deceased. As far as P.W.1 Khwajabi is concerned, she has stated that she knows one Azharul Sultan Ahmad Sayyad. According to her, accused is the same person. She heard the sound of her husband shouting, hence she rushed to the spot and she saw the accused was assaulting her husband. Thereafter, the accused ran away. She has stated that she could not see the object by which the accused assaulted her husband. Moreover,

she has stated that "It is true that I was not knowing the accused but since he had assaulted my husband, I know him. Even I was not knowing his name but since the date of incident, I came to know about his name." From the evidence of this witness, it is seen that prior to the incident, she did not know the accused person. She did not even know his name. It is pertinent to note that in the present case, the appellant came to be arrested four days after the incident. No test identification parade has been held. In such case, P.W.1 Khwajabi identifying the appellant in Court for the first time, whom she did not know prior to the incident and whose name she did not know prior to the incident, would not be of any significance.

6. The second eye witness who has been examined by the prosecution is P.W.2 Kum.Shamimbanu Mohd. Shaikh. She is the daughter of the deceased. She has also stated that before the incident, she did not know the appellant. She stated that she had only seen the appellant running away and she has not seen the appellant assaulting her father. This witness has categorically admitted that prior to the date of the incident she was not even knowing

the accused or his name. This witness was also not called upon to identify the accused in test identification parade. Thus, the evidence of this witness is not of much help to the prosecution.

7. The last eye witness who has been examined by the prosecution is P.W.8 Mrs.Mehboobi Pasha Shaikh. This witness has stated that on the day of the incident at about 6.00 p.m. the victim was abusing his wife. The accused thought that the victim was abusing him (accused). Hence, the accused came with a scissor in his hand and gave blows with scissor on the victim. As far as this witness is concerned, her statement is recorded two months after the incident. This witness claims that the house of the victim was diagonally opposite to her own house. This witness has stated that she was watching the incident from her house by standing in front of her door. According to her, the backside portion of the house of the victim was visible, hence, she was able to witness the incident. She has further stated that there was no door to the backside portion of the house of the victim but the backside of the house of the victim was open. However, this witness has stated that the house of

the victim was diagonally opposite to her house and to go to the house of victim, she had to cross a ‘Nulla’. She has also stated that the house of the victim was covered on all the four sides. Moreover, the panchnama of the scene of offence i.e. house of the victim, shows that back portion of the house of the victim was not open. The house of this witness being diagonally opposite to that of the house of the victim it was not possible for her while standing in the front door of her house to witness any incident in the back portion of the house of the victim. Thus from the evidence on record, it is clear that it was not possible for this witness to have witnessed the incident which had occurred in the back portion of the house of the victim. We have already observed above that the statement of this witness is recorded two months after the incident. There is no plausible or reasonable explanation for the delay in recording her statement. Looking to all these facts, we do not find it safe to rely on the evidence of this witness.

8. The prosecution has also relied upon the evidence of one other witness i.e. P.W.4 Sairabanu

Nisa Ahmed who has stated that she saw accused running away. As far as the evidence of this witness is concerned, she has stated that she heard some commotion hence, she went to the spot. There she saw that many persons had assembled there, deceased Shaikh Mohd. was lying in a pool of blood. When she went near the deceased, the accused ran away from there. However, the evidence of this witness reveals that when she rushed to the spot about 40 to 45 persons had already assembled at the spot. She went inside the house to see the victim and then she came out of the crowd. When she was leaving, she saw the accused running away. The sequence of events wherein she saw the accused running away, to our mind, does not indicate that it is an incriminating circumstance. Had this witness been the first person to reach the spot and immediately at that time, she had seen the accused running away, we could have said that it may be an incriminating circumstance against the accused. But seeing the accused running away after about 40-45 people had gathered on the spot and thereafter if witness had gone inside the house of the victim and came outside and then saw the accused running away, is not, to our mind, an

incriminating circumstance.

9. Besides the three eye witnesses and P.W.4, the prosecution has also placed reliance on the oral dying declaration made by the deceased to P.W.3 Smt. Afzalbi Shaikh Mohd. the second wife of the deceased. She has stated that her daughter P.W.Shamim Banoo heard some commotion. Shamim Banoo went to her father. This witness also followed her. When they reached there, she saw that her husband had fallen down. Thereafter, they placed him in an autorickshaw. In the meanwhile, the police jeep arrived there. Her husband was put in a police jeep and taken to the hospital. It is the case of this witness that in the jeep her husband told her that his neighbour Azaruddin assaulted him by means of knife. We are not inclined to place any reliance on the evidence of this witness that deceased gave oral dying declaration to her wherein, he implicated the appellant. The reason for not placing reliance on this aspect is that this witness has stated that when she reached the spot where her husband was lying, her husband was put into an autorickshaw and by that time, police vehicle arrived there,

thereafter he was put in police vehicle. This witness has clearly stated that her husband was then in an unconscious condition. She has also stated thereafter that when she saw her husband for the first time, he was in an unconscious condition. Even when he was placed in the autorickshaw, he was in an unconscious condition. In such case, we find it difficult to believe that the deceased had made oral dying declaration to P.W.3 Afzalbi Shaikh Mohd. in the police jeep.

10. As far as the recovery of clothes at the instance of the accused is concerned, the articles have not been produced before the Court. No panch has been examined in respect of the recoveries. Looking to the evidence of P.W.9 Sopan Tukaram Borkar on record, we are of the opinion that recovery at the instance of the appellant is not proved.

11. It is seen that name of the appellant is Azaruddin Tafajjal Hussain Shah, however, P.W.1 Khwajabi has stated the name of the accused is Azharul Sultan Ahmed Sayyad. Both names are entirely different. Moreover, the age of the

appellant was given by the complainant as 20 years whereas his age at that time, was about 30 years. As far as the identity of the accused is concerned, there appears to be major discrepancy. Moreover, from the evidence, it is seen that both P.W.1 Khawjabi and P.W.2 Shamimbanu have categorically admitted that they did not know the accused prior to the incident and they did not even know his name. No identification parade was held. Hence, identification of the accused by these two witnesses cannot be relied upon.

12. Moreover, from the medical evidence, it is clear that it is a case of homicidal death. However, it appears that the deceased had number of enemies. P.W.1 Khwajabi who is the wife of the deceased, has admitted that there were number of cases pending against her husband. She has admitted that her husband had many enemies. It has also come on record that victim was drunk and he was abusing P.W.1 Khwajabi at the time of the incident. Moreover, the evidence of D.W.1 Mrs. Fatima shows that number of persons were taken into custody in the present case. This very witness along with one Shabbir, his wife, his son and

brother of Shabbir were also taken into custody in the present case. Shabbir was released after 12 days. Family members of Shabbir and this witness were released some days after they were taken into custody. P.W.1 Khwajabi has also stated that when she reached the police station at about 7 p.m. she was made to sit there and she was set free only in the morning by the police. If the identity of the assailant was clear, the police would not have taken large number of persons into custody in the present case. This clearly shows that police and witnesses were not sure of the identity of the person who had caused death of the deceased.

13. Looking to the entire evidence on record, we are of the opinion that prosecution has not conclusively proved its case against the appellant and the appellant deserves to be given the benefit of doubt.

14. In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 5th November, 2003 passed by the learned Additional Sessions Judge, Gr.Bombay, in Sessions Case No.1360 of 1994 is set aside. The appellant is acquitted

of the offences under Sections 302 and 449 of the IPC. The appellant-accused be set at liberty forthwith if not required in any other case.

[R.M.S.KHANDEPARKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]